Study J-1201 November 27, 1995

Memorandum 95-77

Trial Court Unification: Delegation of Legislative Authority

The trial court unification legislation, Senate Bill 162 (Lockyer), is effective January 1, 1996. The measure provides that on occurrence of a vacancy in a municipal court judgeship, if the Governor makes certain findings concerning the conversion of the judgeship to a superior court judgeship, "the number of municipal court judges for the county shall then be reduced by one and the number of superior court judges for the county shall be increased by one." Is this a valid delegation of legislative authority?

CALIFORNIA CONSTITUTION AND STATUTES

The California Constitution provides:

> The Legislature shall *prescribe* the number of judges and *provide for* the officers and employees of each superior court.
> Cal. Const. Art. VI, § 4 (emphasis added).

> The Legislature shall *provide for* the organization and *prescribe* the jurisdiction of municipal courts. It shall *prescribe* for each municipal court the number, qualifications, and compensation of judges, officers, and employees
> Cal. Const. Art. VI, § 5(c) (emphasis added).

The statutes reiterate the mandate: "The Legislature shall prescribe the number and compensation of judges, officers, and attaches of each municipal court." Gov't Code § 7200.

Pursuant to these provisions, the Legislature has prescribed the numbers of superior court and municipal court judges in each county. See Gov't Code §§ 69580-69615 (superior court); 72600-74987 (municipal court).

Although historically the Legislature has prescribed a fixed number of judges in each county, beginning a decade or so ago the Legislature began to allow the boards of supervisors of some counties to provide for a greater number. The statute governing the superior court in Los Angeles County, for example, provides:

> In the County of Los Angeles there are 224 judges of the superior court, any one or more of whom may hold court. However, at such time as the Los Angeles County Board of Supervisors finds there are sufficient funds for any number of additional judges up to a total number of 14 and adopts a resolution or resolutions to that effect, there shall be 224 judges of the superior court plus the additional judge or judges provided by this section, any one or more of whom may hold court.
> Gov't Code § 69586.

PRESCRIBE v. PROVIDE FOR

Constitutional provisions that a governmental entity shall "prescribe" have been construed to be nondelegable, in contrast with provisions that a governmental entity shall "provide for", which have been construed to be delegable.

In Slavich v. Walsh, 82 Cal. App. 2d 228, 186 P. 2d 35 (1947), the issue was whether the Legislature could constitutionally prescribe salaries of municipal clerks. The controlling constitutional provision at that time was:

> The legislature shall *provide* by general law *for* the constitution, regulation, government and procedure of municipal courts. ... The compensation of the justices or judges of all courts of record, shall be fixed and the payment thereof *prescribed* by the legislature.
> Cal. Const. Art. VI, § 11 (as amended in 1924; emphasis added).

The court stated:

> The proper interpretation of the clause of article VI, section 11, conferring the power on the Legislature to fix the judges' salaries is that by that clause the Legislature itself must fix the salaries, while as to other matters relating to the "constitution, regulation, government" etc., of the municipal courts it is implied that the Legislature can delegate to the respective municipalities control over certain phases of such regulation, including the fixing of attaches salaries as long as such delegation is effected by the "general law."
> 82 Cal. App. 2d at 235.

In County of Madera v. Superior Court, 39 Cal. App. 3d 665, 114 Cal. Rptr. 283 (1974), the issue was whether a county ordinance consolidating two justice districts was valid. The controlling constitutional language at that time was:

> The Legislature ... shall *prescribe* for each municipal court and *provide* for each justice court the number, qualifications, and compensation of judges, officers, and employees.
> Cal. Const. Art. VI, § 5 (as amended in 1966; emphasis added).

The court held that, while the Legislature was authorized by the constitution to delegate the matter to the county, it had not done so, and therefore the ordinance was invalid. The court reasoned:

> Although the Legislature has the ultimate power to control the justice courts, article VI, section 5, *supra*, states that the Legislature "shall ... *provide* for each justice court the number, qualifications, and compensation of judges, officers, and employees." (Italics added.) In wording this section, the Constitutional Revision Commission used the word "provide" rather than "prescribe" to indicate an intention to permit the Legislature to delegate this duty.
> 39 Cal. App. 3d at 669-670 (fn. omitted).

CONSTITUTIONALITY OF DELEGATION

Case Law

Despite plenty of cases stating the general common law proposition that a delegation of legislative authority may be made if sufficient standards are provided as part of the delegation, we have found only two cases actually deciding the validity of a legislative delegation of authority in the face of a constitutional requirement that the Legislature "shall prescribe" details of the operation of the judicial system. Both cases upheld the delegation.

Martin v. County of Contra Costa, 8 Cal. App. 3d 856, 87 Cal. Rptr. 886 (1970), determined the constitutionality of a statute that set municipal court employee salaries but provided that any county ordinance changing benefits for county employees generally would apply also to municipal court employees. The governing constitutional language at that time was:

> The Legislature ... shall *prescribe* for each municipal court and *provide* for each justice court the number, qualifications, and compensations of judges, officers, and employees.
> Cal. Const. Art. VI, § 5 (as amended in 1966; emphasis added).

The court upheld the constitutionality of this delegation, stating:

> This provision is not an abdication of the Legislature's duty to prescribe the compensation of the attaches of each municipal court.

> It fixes the compensation of the employees, declares a policy that such compensation shall be commensurate with that furnished county employees with equivalent responsibilities and provides for interim changes, subject to review by the Legislature, in the event there are local changes which would otherwise cause discrepancies in compensation in violation of the legislative policy.
> 8 Cal. App. 3d at 862.

In Board of Supervisors v. Krumm, 62 Cal. App. 3d 935, 133 Cal. Rptr. 475 (1976), the municipal court ordered the hiring of two new marshals pursuant to a statute that allows more than the statutorily prescribed number of deputies in case of an increase of business of the municipal court or other emergency. The board of supervisors contested this order on grounds that included the primacy of the Legislature to determine municipal court staffing under Article VI, Section 5 of the Constitution. The court rejected the argument, stating:

> Such argument proceeds from plaintiff's view of the effect to be given to section 5, article VI, of the California Constitution, already noted, which specifies that the "Legislature ... shall prescribe for each municipal court ... the number ... of... officers, and employees." The short answer to that contention is that the Legislature itself enacted section 72150 and within the constitutional prescription thereby provided a specific mechanism for the staffing of municipal courts under emergency circumstances.
> 62 Cal. App. 3d at 944.

Attorney General Opinions

On the other hand, the Attorney General has issued an opinion that a statute permitting superior and municipal court judges to be covered under county health insurance programs is an unconstitutional delegation of legislative authority. 59 Ops. Cal. Atty. Gen. 496 (1976). The constitutional provision at issue states:

> The Legislature shall *prescribe* compensation for judges of courts of record.
> Cal. Const. Art. VI, § 19 (as amended in 1974; emphasis added).

The Attorney General argues that, "Because of the use of 'prescribe' the Legislature cannot delegate the authority granted to it by Article VI, section 19 of the Constitution. Any attempt to make such a delegation would be constitutionally invalid." 59 Ops. Cal. Atty. Gen. at 497. The Attorney General

reasons that benefits such as health insurance are part of compensation, that the effect of the statute in question is to allow counties to determine this aspect of a judge's compensation, and thus the statute is an unconstitutional delegation of legislative authority.

The Attorney General distinguishes the *Martin* case, pointing out that the statute involved in that case was a detailed treatment of compensation of employees in a particular county, and was subject to continuing legislative review of the county's actions. The health care statute involved in the Attorney General Opinion, on the other hand, is of statewide applicability, and is not subject to continuing legislative control over subsequent changes by counties.

The Legislature responded to the Attorney General's opinion by amending the statute in 1977 to provide that judges would participate in the health plan subject to "the same or similar employee benefits as are now required or granted to employees of the county." This was evidently an effort to make the statute similar to the parity statute held constitutional in *Martin*. The Attorney General did not buy it, again issuing an opinion that the statute is unconstitutional. 61 Ops. Cal. Atty. Gen. 388 (1978). The opinion elaborates:

> Thus, the Constitution explicitly mandates the Legislature to itself determine the compensation of judges. Therefore if the Legislature seeks to involve other agencies in this compensation determining process, it would, at the very least, have to formulate reasonably precise standards as a constraining statutory guide for such agencies. (59 Ops. Cal. Atty. Gen. 496, *supra*. See *Blumenthal v. Board of Medical Examiners* (1962) 57 Cal. 2d 228, 235. See also the discussion in 59 Ops. Cal. Atty. Gen. 496, *supra*, at pp. 498-500, of the statutory standards approved in *Kugler v. Yocum* (1968) 69 Cal. 2d 371 and in *Martin v. County of Contra Costa* (1970) 8 Cal. App. 3d 856.)
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> 61 Ops. Cal. Atty. Gen. at 390.

APPLICATION TO SB 162

Does SB 162, by vesting in the Governor the authority to increase the number of superior court judges and decrease the number of municipal court judges in a county, run afoul of the constitutional requirement that the Legislature shall "prescribe" the numbers of superior court and municipal court judges? Cal. Const. Art. VI , §§ 4, 5.

While the Constitution and rules of construction appear to be absolute, the only authorities that have directly addressed the constitutionality of a statutory delegation are more liberal. An argument can be made for constitutionality of SB 162 on the following grounds:

(1) The bill does not provide an across-the-board delegation, but requires the Governor to consider the circumstances of each county and each judgeship individually.

(2) The bill does not give unfettered discretion to the Governor, but provides specific standards and findings that must be satisfied before the Governor may act under the delegation of authority. Specifically under SB 162, the Governor must find that there are sufficient funds and that the administration of justice would be advanced. In making the determination, the Governor must consider geographic separation of the courts, the fiscal impact of conversion, and the existence of an adequate coordination plan in the county.

(3) The Legislature has prescribed the total number of judges in the county. The Governor is not authorized to vary that number, but only to shift the prescribed number between municipal and superior courts in the county.

(4) The history of allowing limited variation in numbers of judges by county boards of supervisors during the past decade establishes a practice that must be read as a gloss on the Constitution. If SB 162 were held unconstitutional, what would be the implication for counties that have increased the number of judges pursuant to statutory authority, and what would that do to the thousands of judgments, orders, etc., made by unconstitutionally constituted courts?

An intangible in the effort to determine whether the delegation of legislative authority by SB 162 would be held constitutional is the basic attitude of the judicial branch towards unification. In the end the judicial branch, and not the Attorney General or the legislative branch, makes the determination of constitutionality. Statutes providing that municipal court employee benefits were to be on a parity with those of other county employees, and for necessary increases in the number of employees, were held constitutional by the courts. A statute providing judges county health benefits was declared unconstitutional by the Attorney General but not by the courts. Judges appear to be divided on the matter of unification, both at the trial and appellate court level. However, we believe that judicial opposition to the gradualist approach of SB 162 is muted.

WHAT, IF ANYTHING, SHOULD BE DONE?

There is a risk that SB 162 would be held to be an invalid delegation of legislative authority to the Governor. While an argument can be made for constitutionality, the risk of an adverse determination is real. The stakes are high, since a determination after the fact that a judgeship has been improperly converted could cause a number of significant problems. Whether judgments rendered by judges acting beyond their jurisdiction are void or voidable is a question the staff has not yet researched, but this would be a concern.

What, if anything, can or should be done to minimize the risk? The staff deems the following options, at least, to be worth considering.

Do Nothing

A plausible argument can be made that the SB 162 delegation of authority is proper, despite what appears to be a plain limitation in the Constitution. It may be that the validity of the delegation will never even become an issue, just as the validity of statutes delegating authority to county boards of supervisors to increase the number of judges in their counties have not become an issue. Over time, as judgeships are converted and the system changes, it will become impractical to undo the changes and the Constitution will be read in light of long-standing practice. However, there are real risks, and the stakes are high.

Test Case

The Governor could convert a single judgeship to serve as a test case for a judicial determination of validity; alternatively, declaratory relief might be a possibility. This would enable a definitive determination of the issue without the substantial problems involved if SB 162 were held invalid after full implementation for a substantial period. However, this would delay implementation of SB 162 for some time. It could also make it easier for a holding of invalidity, since the consequences of such a holding would be minimal compared to the problems that would be caused if SB 162 were in full operation.

Amend Statute

The statute could be revised in a manner that ensures it would fall within the standards of the existing authorities. This would involve perhaps some additional standards for conversion and some form of legislative review of experience under the conversion process. This is not an attractive option, since

the present scheme is the result of a compromise between all three branches of government, reached after several years of work and negotiations; to suggest it be redone would not be productive. Moreover, the existing standards in the statute are probably sufficient, if a court follows the existing authorities. It is only an absolutist reading of the Constitution that presents a danger, and amendment of the statute would not help in this respect.

Amend Constitution

An obvious way to ensure the validity of the conversion of judgeships by the Governor is to amend the Constitution to provide that the Legislature shall "provide for" rather than "prescribe" the number of superior court and municipal court judges. This approach has a number of drawbacks, however, including:

Timing. SB 162 becomes operative January 1, 1996, but absent an emergency the Legislature cannot could not even begin proceedings to amend the Constitution until it reconvenes on January 3. Existing law requires a period of 131 days after adoption of a constitutional amendment by the Legislature before the amendment may be voted on by the people. Elec. Code § 9040. Since the next statewide election date is the presidential primary, which in 1996 has been moved forward to March 26, this would mean a delay until the November 5 general election before the measure could be voted on. It might be feasible for the Legislature to exempt this measure from the 131-day waiting period, if the measure can be passed quickly enough that a March 26 election date is logistically feasible.

Retroactive Application. Revision of the Constitution could be deemed an implicit acknowledgment that the existing delegation of authority to the Governor is invalid. What would this do to any conversions of judgeships made before the Constitution is revised? The problem could be avoided by keeping the Governor's office informed of the situation, and the Governor could refrain from making appointments until the Constitution has been amended. Alternatively, the constitutional amendment could include curative language that validates any conversions made before the amendment. The staff would need to do further research to determine whether curative language of this type would be effective.

Wrong Result. There is always the possibility that the voters would not approve the proposed constitutional amendment. Then the fate of SB 162 would be sealed, regardless of any uncertainty about its validity that might have existed

before the election. There are interests opposed to unification, and the argument that unification will increase judicial salaries has been effective with the voters in at least one previous unification effort, despite the fact that unification should yield overall savings to the judicial system. The fact that the Governor must consider the fiscal impact of the conversion and find there are sufficient funds to do it may help in this respect.

Add Statutory Savings Clause

One way to proceed is to assume the validity of SB 162, but to add curative or savings language to the statute to deal with potential problems in the event it is ultimately held invalid. This should be do-able, since before converting a judgeship the Governor must consider the existence of a coordination plan in the county that permits blanket cross-assignment of judges. The staff envisions a statute along the following lines:

> If conversion by the Governor of a municipal court judgeship to a superior court judgeship under Section 68083 is determined by a final judgment of a court to be invalid for any reason:
>
> (a) All judgments, orders, decrees, and other acts of any incumbent of that judgeship within the jurisdiction of the superior court shall be deemed to be acts of the incumbent made as a judge of the municipal court acting under cross-assignment pursuant to the trial court coordination plan of the county.
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> (b) The Judicial Council shall reallocate to the municipal court the funding in support of the municipal court salary and the chamber staff positions and other previously allocated funding for the judgeship, but all salary, benefits, and other payments made in support of the converted judgeship before the effective date of the final judgment shall be deemed to have been made as part of the trial court coordination plan of the county.

We would need to consult with the Judicial Council to make sure that all bases are covered in such a statute. The existence of such a statute could make it easier for a court to determine the underlying invalidity of SB 162, however, by lowering the stakes.

CONCLUSION

Although there is certainly a possibility that SB 162 will be held to be an invalid delegation of legislative authority to determine the number of superior court and municipal court judges, a case can be made that this will not occur. The

problems that would be created if it is held invalid are substantial. The staff believes something should be done in anticipation of this possibility. All of the alternatives discussed in this memorandum have drawbacks. However, of the alternatives, the staff prefers a savings clause that would validate actions taken under the converted judgeship if the conversion is held invalid. This approach appears to be low-key and workable; it could substantially minimize risks of implementation without causing substantial delay of implementation.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary